

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Northern Illinois Gas Company)	
d/b/a Nicor Gas Company)	
)	Docket No. 08-0363
Proposed general increase in rates, and)	
revisions to other terms and conditions)	
of service)	

**NICOR GAS COMPANY’S RESPONSE TO THE PETITION
FOR INTERLOCUTORY REVIEW OF ADMINISTRATIVE LAW JUDGES’ DENIAL
OF PROGRESSIVE ENERGY GROUP’S PETITION TO INTERVENE**

Northern Illinois Gas Company d/b/a Nicor Gas Company (“Nicor Gas”) hereby submits its Response to the Petition for Interlocutory Review of Administrative Law Judges’ Denial of Progressive Energy Group’s Petition to Intervene. On August 20, 2008, the Administrative Law Judges (the “ALJs”) denied a request by Progressive Energy Group, LLC (“PEG” or “Petitioner”) to participate as a party in this proceeding (the “ALJs’ Order”). The ALJs correctly determined that PEG’s alleged future interest in becoming an Alternative Gas Supplier (“AGS”) fails to establish a statutory right to intervene or any “claim or defense that is in common with *anything* in this docket.” (ALJs’ Order, p. 2) (emphasis provided). The unsupported argument PEG offers on interlocutory review warrants no different outcome. Accordingly, the Illinois Commerce Commission (the “Commission”) should deny the Petition for Interlocutory Review and affirm the carefully reasoned ALJs’ Order.

I. The ALJs Properly Concluded That PEG Has Not Shown A Sufficient Interest In This Proceeding

The ALJs properly denied PEG’s Petition to Intervene, correctly recognizing that PEG failed to sufficiently state facts that would entitle it to participate in this docket. (ALJs’ Order, p. 4). In its Petition to Intervene, PEG asserted that it should be allowed to intervene

as “a *prospective* participant in the Illinois gas market.” (Petition, p. 1) (emphasis added). In its Opposition to PEG’s Petition to Intervene (“Opposition”), Nicor Gas demonstrated that PEG’s interest was admittedly prospective only, and that an anticipated or potential future interest in the outcome of the case was insufficient to allow intervention. (*See* Nicor Gas’ Opposition, *passim*). As the ALJs pointedly noted, this speculative interest reasonably cannot serve as a proper basis for intervention, because it is far from certain that the Commission ever will grant PEG a certificate to do business as an AGS. (ALJs’ Order, p. 3).¹

In its Petition for Interlocutory Review, PEG now argues that its statement of interest, however speculative or hypothetical, is all that is required under the Commission’s Rules of Practice, Section 200.200(a)(2). Section 200.220 of the Commission’s Rules of Practice provides that “[p]etitions to intervene shall contain” a “plain and concise statement of the nature of the petitioner’s interest.” 83 Ill. Admin. Code § 200.200(a)(2). Section 200.200(a), therefore, outlines the procedural requirements for each petition to intervene that comes before the Commission. However, as the ALJs recognized, a listing of items that must be pled in a petition to intervene under Section 200.200 does not constitute a “standard” that the Commission should apply in evaluating the merits of a prospective intervenor’s standing. (ALJs’ Order, p. 1). PEG argues that the ALJs erred in looking beyond whether PEG’s Petition to Intervene included a rote statement of its supposed interest in this docket. Presumably, under PEG’s approach, the ALJs were constrained to deciding whether PEG’s pleading was “plain” or “concise” enough.

The determination on a petition to intervene, however, is not an exercise in grammar. As the ALJs’ Order correctly recognized, PEG’s narrow approach seeks to take Section 200.200 out

¹ Since the filing of its Petition to Intervene, PEG has filed an Application for Certification as an Alternative Gas Supplier under Section 19-110 of the Act. 220 ILCS 5/19-110. Nicor Gas has sought leave to intervene in the certification proceeding, Docket No. 08-0478, citing concerns about the technical, financial, and managerial capabilities of PEG. *See* Petition to Intervene, Docket No. 08-0478, filed Aug. 29, 2008.

of context entirely. The rule contemplates a decision on the merits of a petition, not merely that a petition to intervene parrot the language of the Commission's rules. *See Village of Bloomingdale v. Meline*, 309 Ill. App. 3d 389, 391-92, 722 N.E.2d 335, 337-38 (2nd Dist. 1999) (agency rules must be construed in light of their purpose). If the Commission were to accept PEG's argument that Section 200.200(a) limits the Commission's discretion to parsing the words presented in a petition to intervene, then the Commission would be powerless to deny any petition for intervention—regardless how specious the intervening party's alleged interest—so long as the party's petition set forth some conclusory allegation of “interest” that was sufficiently plain and sufficiently concise. The Commission's Rules of Practice do not contemplate such an absurd result. *See* 83 Ill. Adm. Code § 200.25 (the Commission should exercise its discretion to promote the goals of integrity, fairness, speed, convenience and cost-effectiveness in its proceedings).

It was in recognition of Section 200.200(a)'s governance of procedural pleading requirements that the ALJs concluded that “satisfying the requisites in the Commission's Rules can have no impact upon whether the allegations in a petition seeking leave to intervene warrant intervention.” (ALJs' Order, p. 2). The ALJs further explained this very elemental distinction between pleading requirements and an evaluation of the merits of the claimed interest in a footnote. (ALJs' Order, fn. 1).

The ALJs correctly acknowledged that Section 200.200 itself does not contain a standard that dictates how ALJs are to evaluate the facts presented in a petition and determine whether the factual allegations supporting the petitioner's “interest”—here admittedly “prospective”—should warrant granting or denying the petition. (ALJs' Order, p. 1). However, the ALJs appropriately

relied upon relevant case law in making their determination that PEG's statement of "interest" was insufficient. For these reasons, PEG's intervention was properly denied.

II. The ALJs' Applied the Appropriate Standard in Evaluating PEG's Petition to Intervene

PEG provides no legal support, and there is none, for its contention that it somehow is being denied due process because it cannot participate in this docket. PEG's request to intervene was considered and appropriately denied consistent with the Commission's Rules of Practice and relevant case law interpreting Section 2-408 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-408, which governs intervention in the courts. PEG received a complete opportunity to support its proposed intervention and failed. That is all the process PEG is due.

Contrary to PEG's argument, the ALJs appropriately looked to case law for guidance in articulating the standard that must be met before a party's interest rises to the substantial level required for intervention. *See, e.g., Egyptian Electric Cooperative Ass'n v. Illinois Commerce Comm'n*, 33 Ill. 2d 339, 211 N.E.2d 238 (1965) ("*Egyptian*") (cited in Nicor Gas' Opposition, holding that the required factual showing for intervention would establish that "the proposed order would have a direct and adverse effect" upon the petitioner's rights).² The ALJs' also properly looked to case law interpreting intervention under the Illinois Code of Civil Procedure in recognizing guidelines applicable to intervention petitions, finding that an intervening party "must allege facts establishing that it has an enforceable and recognizable right, not simply a general interest, in the subject matter of the proceeding" and that a party's interest may not be speculative or hypothetical. (ALJs' Order, pp. 2-3) (*citing Soyland Power Cooperative v. Illinois Power Co.*, 213 Ill. App. 3d 916, 919; 572 N.E.2d 462 (4th Dist. 1991); *In re Adoption of Ruiz*,

² Nicor Gas adopts and incorporates its arguments set forth in its Objection to the Verified Petition to Intervene of Progressive Energy Group, LLC, as if fully set forth herein.

164 Ill. App. 3d 1036, 1040; 518 N.E.2d 436 (1st Dist. 1987)). The application of such principles in evaluating petitions to intervene is equally useful under either the Code of Civil Procedure or Section 200.200 of the Commission's Rules.

III. PEG's Asserted Interests Are Adequately Protected

PEG further argues that even if it is eventually granted AGS status, its interests will be different from other AGS or Customer Select customers. Like in its Petition to Intervene, PEG's factual allegations in its Review Petition are limited to vagaries and bald assertions that "all AGS do not have the same interests." (Review Petition, p. 4). Yet, PEG still is unable to provide even a single specific reason why the participation of current AGS Customer Select intervenors in the proceeding is inadequate to protect PEG's interest should it become an AGS at some undetermined point in the future. It is PEG's interest that is at issue, and conclusory statements that some AGS are different than others are an insufficient basis to allege that PEG's intervention is necessary.

The closest PEG comes to articulating a specific interest that it needs to protect is to allege that "... a major factor in PEG's interest in intervening in this proceeding is Nicor Gas' refusal to provide third party billing services as outlined in its own tariff. Absent this refusal, PEG would be doing business in Nicor Gas' service territory right now." As the ALJs found, PEG's putative future interest in doing business with Nicor Gas via its third-party billing service tariff does not constitute a sufficient interest to merit intervention. (ALJs' Order, p. 3). If PEG now is asserting a specific alleged wrongful act, it has recourse within the Public Utilities Act and may file a complaint case. 220 ILCS 5/10-108. It may not, however, make such unsupported allegations for the first time on interlocutory review and suggest that such allegations amount to "facts" which constitute an interest in the outcome of the rate case

proceeding. There has been no showing by PEG that Third-Party Billing is actually at issue in the Nicor Gas rate filing, or that tariff provisions governing Third-Party billing is subject to a proposed revision under Nicor Gas' filing.

IV. Conclusion

WHEREFORE, for all of the reasons set forth above, Northern Illinois Gas Company, d/b/a Nicor Gas Company requests that the Commission affirm the ALJs' Order denying PEG's intervention in this proceeding and, therefore, deny the Petition for Interlocutory Review of Administrative Law Judges' Denial of Progressive Energy Group's Petition to Intervene, and for any other relief that the Commission deems just.

Dated: September 3, 2008

Respectfully submitted,

NORTHERN ILLINOIS GAS COMPANY
D/B/A NICOR GAS COMPANY

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CERTIFICATE OF SERVICE

I, John E. Rooney, hereby certify that I served a copy of the Response to the Petition for Interlocutory Review of Administrative Law Judges' Denial of Progressive Energy Group's Petition to Intervene of Northern Illinois Gas Company d/b/a Nicor Gas Company to the service list in Docket No. 08-0363 by e-mail on September 3, 2008.

/s/ John E. Rooney

John E. Rooney